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In The

Supreme Court of the United States

October Term, 1973

No. 73-1408

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT NO. 131 OF KANE COUNTY, ILLINOIS; BONNIE SCHOEPPEL, HENRY W. COWHERD, JR., FRANK N. HETTINGER, ERVIN C. KIESO, ALBERT PLATT, STUART J. SHOGER and LEO KISH, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; ANDREW J. HOOK, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois,

Petitioners,

vs.

AURORA EDUCATION ASSOCIATION EAST, DON IRELAND, JEANETTE SMITH, DAVE COLE, BERNIE ZIELIE, DIANA PARKER, LeROY OLSON and CAROLE DAVEY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LAMBERT M. OCHSENSCHLAGER
REID, OCHSENSCHLAGER, MURPHY AND HUPP
75 South Stolp Avenue — P. O. Box 1368
Aurora, Illinois 60507
Telephone: (312) 892-8771

Attorney for Petitioners

ROBERT B. HUPP
WAYNE F. WEILER
REID, OCHSENSCHLAGER, MURPHY AND HUPP
Of Counsel

Midwest Law Printing Co., Chicago 60601, FInancial 6-3988

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In The

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October Term, 1973

No.

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT NO. 131 OF KANE COUNTY, ILLINOIS; BONNIE SCHOEPPEL, HENRY W. COWHERD, JR., FRANK N. HETTINGER, ERVIN C. KIESO, ALBERT PLATT, STUART J. SHOGER and LEO KISH, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; ANDREW J. HOOK, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois,

Petitioners,

vs.

AURORA EDUCATION ASSOCIATION EAST, DON IRELAND, JEANETTE SMITH, DAVE COLE, BERNIE ZIELIE, DIANA PARKER, LeROY OLSON and CAROLE DAVEY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; Bonnie Schoeppel, Henry W. Cowherd, Jr., Frank N. Hettinger, Ervin C. Kieso, Albert Platt, Stuart J. Shoger, and Leo Kish, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; Andrew J. Hook, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit rendered on December 20, 1973.

OPINIONS BELOW.

The District Court for the Northern District of Illinois, Eastern Division, Judge William J. Lynch presiding, issued a written Memorandum of Decision. To the knowledge of Petitioners, this opinion has not been reported. A copy of the District Court's opinion is attached hereto as Appendix A. The opinion of the Court of Appeals here sought to be reviewed is reported in ..... F.2d ..... (1973). A copy of the opinion is attached hereto as Appendix B.

JURISDICTION.

The opinion of the Court of Appeals was rendered on December 20, 1973. Petitioners filed a Petition for Rehearing which was denied on January 14, 1974 (App. C). The mandate of the Court of Appeals issued to the District Court on January 30, 1974. The Court of Appeals denied a motion to recall and stay its mandate on February 26, 1974. The Jurisdiction of the Federal Court is asserted by the plaintiff and Respondent here under 28 USC Section 1343 and 42 U.S.C., Section 1983 as amended. Jurisdiction is also conferred upon this Court by 42 U.S.C. §1984. These code references are set forth in full in the Appendix (D) filed with this petition.

QUESTIONS PRESENTED FOR REVIEW.

1. Whether the determination by the Seventh Circuit Court of Appeals that the Petitioners are proper defendants within the coverage of 42 U.S.C. §1983 is in conflict with this Court's decisions in *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); and *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973).

2. Whether the determination by the Seventh Circuit Court of Appeals that the defendant-petitioner, Board of Education, is not a "municipal corporation" and, therefore, within the coverage of 42 U.S.C. §1983 is in conflict with Article X, Section 1, Illinois Constitution of 1970; and with Chapter 24, Section 1-1-5 and Chapter 85, Section 1-206 of the Illinois Revised Statutes, all of which treat school boards in Illinois as "municipal" or "quasi-

municipal corporations" or as "local public entities" for purposes of immunity from suit.

3. Whether the Court of Appeals in gratuitously holding that Petitioners are proper defendants in this litigation, has either ignored or erroneously construed the judicial standards established by this honorable court for the purposes of determining whether a governmental agency is eligible for immunity under 42 U.S.C. §1983 as a sufficient "body politic." *Moor* v. *County of Alameda,* 411 U.S. 693 (1973).

4. Whether the Court of Appeals in determining that Petitioners are proper defendants has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision in that the Court below interjected into its opinion the determination of an issue which was not before that Court and which had not been briefed or argued by the parties.

5. Whether the Court below was in error in making such a binding determination that the Petitioners may not now fully and fairly litigate the question in the trial court as to whether a school board and its members and superintendent are proper defendants in an action brought under 42 U.S.C. §1983.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON.

The constitutional provisions and statutes, etc., upon which this petition is based are set forth verbatim in the Appendices.

STATEMENT OF THE CASE.

This action has been brought by a group of teachers who charged that the defendants-petitioners, the School Board, its members (in their individual and official capacities) and its Superintendent of Education, violated the plaintiffs'-respondents' civil rights while acting under the color of law. They allege violations of Title 42 U.S.C. §1983 and the First and Fourteenth Amendments of the United States Constitution.

On June 9, 1971, the individual plaintiffs and other members of the plaintiff, Aurora Education Association East (AEAE) adopted a resolution that the teachers in the school district would not return to the class room at the beginning of the ensuing fall semester if there were not satisfactory settlement of contract negotiations between the school board and the AEAE. All of the individual plaintiff teachers had at that time attained contractual continued service or tenure.

In Illinois a tenured teacher must give notice of termination more than sixty (60) days prior to the beginning of the school term unless excused by agreement of the school board (Chap. 122, Ill. Rev. Stat. Sec. 24-14, see Appendix E). Under Illinois law, any teacher terminating service at any other time is guilty of unprofessional conduct and liable for the suspension of his or her teacher certification. None of the individual plaintiffs had given proper notice within the required time and on the date of the AEAE resolution were bound under the Illinois statute to return to their teaching positions at the beginning of the next school term (July 1, 1971).

Under the provisions of Illinois statute, a tenured teacher is assured of continued employment, but only under the terms and conditions of the teacher employment contract extended to him during the last school term in which he occupied a probationary status prior to attaining tenured status. The achievement of tenured status and its accompanying rights and privileges is subject to statute and the lawful regulations of the Board of Education (Chapter 122, Ill. Rev. Stat. Sec. 24-11, see Appendix E).

In the summer of 1971 the defendant School Board was operating under a statement of policy, labeled School Board Policy 1.30 Article II, which permitted a labor organization to negotiate, on behalf of teachers, with the Board, but excluding from all bargaining rights "any organization (1) which asserts the right to strike against any . . . agency of the government, or to assist or to participate in any such strike, or which imposed a duty or obligation to conduct, assist or participate in any such strike. . . ." In Illinois strikes by teachers and other school employees are unlawful as against public policy. *Bd. of Ed. of Kankakee School Dist. No. 111* v. *Kankakee Federation of Teachers Local No. 886,* 46 Ill. 2d 439, 264 N.E. 2d 18 (1970) cert. den. 403 U.S. 904; *Board. of Ed. of Community Unit School Dist. No. 2* v. *Redding,* 32 Ill. 2d 567, 207 N.E. 2d 427 (1965).

In reaction to the AEAE resolution, the defendant School Board and its members terminated all contract negotiations with the AEAE. On June 21, 1971, each teacher in the school district received a letter from the superintendent and was tendered a contract. Language

from the letter accompanying the proffered contracts stated in part as follows:

> Dear Staff Member:
>
> By the time you receive this, you undoubtedly will have heard or read about the action taken by the Board of Education at its June meeting. At that meeting the Board, acting upon legal advice and recommendations made by their attorneys, passed a resolution to file a suit for declaratory judgment and such other relief as in the judgment of counsel may be proper, based upon the contention that the recent act of a large number of teachers has resulted in a resignation of their employment.
>
> However, it is not the board's desire, nor my own, to relieve any teacher of his duties should he choose to remain a teacher in District 131. Therefore, individual contracts are being extended to each teacher of the district giving him the right to return to District 131 at an increased salary rate and additional insurance benefits, without losing his tenure rights. In opting a new schedule, the board feels it has gone as far as possible to be both fair and reasonable in light of good business practice in current economic conditions.

More than four hundred of the teachers executed the proposed contract, and, thus, became entitled to advantages not offered in the 1970-1971 contracts. To the seven individual plaintiffs, none of whom executed the proper contracts, the board offered continued employment for the new year on the old terms. The seven continued at work under the 1970-1971 terms and under their tenure rights and then brought this suit in the District Court.

Relying on the United States Constitution's Fourteenth Amendment's due process clause and its alleged incorpo-

ration of principals of the First Amendment, and also relying on Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, plaintiffs sought (1) a declaration that, as here applied, School Policy 1.30 was invalid, and that plaintiff teachers were entitled to be placed on the same salary schedule and like terms as those teachers who executed the proposed 1971-1972 contract, (2) an injunction protecting the future rights so declared, (3) back pay based on the 1971-1972 schedule, (4) $25,000.00 actual damages, (5) $25,000.00 exemplary damages, and (6) all attorney's fees and costs.

Jurisdiction in the Court of first instance was based upon 28 USC §1343 and 42 USC §1983. (Appendix D).

Defendants moved to dismiss on the grounds that (1) the Complaint failed to state a valid claim, (2) plaintiffs' purported claims under 42 U.S.C. §1983 did not lie against the board of its members, and (3) the association was not a proper plaintiff to assert the alleged claim under 42 U.S.C. §1983.

Solely on the ground that it failed to state a valid claim, the district court for the Northern District of Illinois Eastern Division, Judge William J. Lynch presiding, dismissed the Complaint. The district court offered no final determination as to the merits of defendants' other stated grounds for dismissal.

On appeal the United States Court of Appeals for the Seventh Circuit in reviewing the District Court's determination reversed, holding that the actions of defendants as alleged in the Complaint were sufficient to maintain a cause of action for violation of Civil Rights under the First and Fourteenth Amendments of the Con-

stitution and under the provisions of 42 U.S.C. §1983. No review of this holding is sought.

Following its reversal of the District Court on the Constitutional and Civil Rights issues, the Court of Appeals without setting forth any authority or stating any grounds therefor added the following language in its opinion:

> Defendants suggest miscellaneous grounds, not relied upon by the district court, which they argue could have supported its dismissal in the complaint. We note that at least one of the points stressed by defendants is unsound. The Board is not a municipal corporation and in that capacity outside the coverage of 42 U.S.C. §1983, as construed in *Monroe* v. *Pape,* 365 U.S. 167 (1961).

Thereafter, without making any reference to this Court's decision in *City of Kenosha* v. *Bruno,* 412 U.S. 507 (1973), the Court of Appeals made the following statement:

> Under these circumstances, plaintiffs have not lost their standing to invoke at least equitable relief, *Hecht Co.* v. *Bowles,* 321 U.S. 321 (1944), not to mention the continued vitality of their claim for monetary compensation, remedial and punitive.

SUMMARY OF ARGUMENT.

In June, 1971, following a strike vote of teachers, the Board of Education for School District 131, Aurora, Illinois, mailed to each of its teachers an individual contract of employment for the 1971-1972 school year. All teachers were treated alike. Of the more than 450 teach-

ers involved, the seven plaintiffs here elected not to sign the contract and insisted (and were permitted to), teach under their contractual continued service rights (tenure) as provided by the Illinois School Code.

While they were paid a salary in accordance with the provisions of tenure, these plaintiffs were aggrieved because they did not receive the same salary paid those teachers who did sign the contract and agreed in writing not to strike during the ensuing school year. For this reason they brought this action against the School District, the Board members and the superintendent of schools based on an alleged violation of their Federal Civil Rights.

While the District Judge was presented with a number of reasons why this suit should be dismissed, he chose to base his decision upon a ruling that there has been no statement of a claim upon which relief could be granted. Since Petitioners are not seeking review of the constitutional point, we consider it unnecessary to discuss this further. Petitioners do contend, however, that the gratuitous interjection by the Appellate Court into its opinion language to the effect that Petitioners are proper defendants because a school board is not a "municipal corporation" and that plaintiffs would at least be able to invoke equitable relief is not only erroneous but also will cause confusion upon remand to the trial judge.

This Court's confusing dictum will also encourage the improper filing of many more similar actions against school districts. Petitioners insist that if given the opportunity, they can show the defendant school board to be

a municipal or quasi-corporation under the laws of the State of Illinois.

Therefore, it is the above comment by the Court of Appeals that we ask this Court to supervise or review. Even if this Court would deny this petition, a memorandum statement informing the District Judge that he is not bound by the Court of Appeals' dictum on this question would be of assistance to the disposition of this case. It would also allow for briefing and argument on this issue on remand thus affording due process to petitioners.

The Court of Appeals below has settled an important Federal question in a way which has so far departed from the so-called usual and acceptable course of judicial proceedings that it is a deprivation of due process to the petitioners herein and, therefore, calls for an exercise of this Court's power of supervision. Neither the Petitioners nor their respondents herein were given an opportunity to argue or brief the issue which the Court of Appeals gratuitously decided.

The Court of Appeals' opinion has left the parties and the trial court in a quandry. The third full paragraph on page 5 of the decision affords no directive to the parties or the district court as to how to proceed. The situation confronted is not a "hypothetical case."

The Court of Appeals has refused to clarify its opinion in this case, and its present holdings will only serve to invite a multitude of civil rights' cases against school boards which would not otherwise have been brought in light of the heretofore prevailing decisions.

REASONS FOR GRANTING THE WRIT.

I.

THE COURT BELOW HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY IN DIRECT CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

While citing *Monroe* v. *Pape*, 365 U.S. 167 (1961), the Court of Appeals offered no grounds for its decision that a school board is not a municipal corporation immune from the coverage of §1983. The United States Supreme Court has recently broadened the scope of immunity which it granted under its *Monroe* decision. In *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), the Court held that a county was eligible for immunity as a sufficient "body politic." In *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), the Court further extended *Monroe* by closing off the avenue of equitable relief which had at that time been available against municipalities under §1983. Clearly, the Supreme Court in these two decisions extending the immunities initially granted under *Monroe* has emphasized the intent of Congress that the Civil Rights Act was not meant to authorize actions against governmental entities not considered "persons" under the Act.

It is grossly inconsistent for the Seventh Circuit to deny such immunity to school boards without comment, when at the same time the Supreme Court is broadening the nature of this immunity. The expansive language of *Kenosha* leaves little question that it is not limited to municipalities but that it is applicable to all agencies of state and local government. See *"The Su-*

preme Court 1972 Term," 87 Harv. L. Rev. 57, 258 (1973).

For the Court of Appeals here to flatly deny immunity to school boards under §1983 without further comment is to leave the Courts within the Circuit without sufficient guidelines with which to determine similar Civil Rights litigation which will arise in the future. This Court should clarify the law in this case to rectify the serious confusion which has been brought about. It should also be noted that the Court of Appeals' statement at the end of its opinion that plaintiffs' claim for equitable relief and for monetary damages has continued vitality adds further confusion in light of the Supreme Court's *Kenosha* decision.

Had petitioners known the Court of Appeals was about to decide a question of law not presented to it for determination these cases would have been called to that Court's attention.

II.

THE COURT BELOW HAS RENDERED A DECISION IN CONFLICT WITH OTHER COURTS OF APPEALS.

Beyond its decision in this case, the Seventh Circuit has never before ruled directly on the question of immunity for school boards under §1983. However, in relying on this Circuit's holdings in other cases of a similar nature, the District Courts within this Circuit have consistently held that school boards and their members individually are not within the coverage of 42 U.S.C. §1983 for purposes of monetary damages: *Kelly* v. *Wisconsin Interscholastic Athletic Ass'n,* 367 F. Supp. 1388 (1974); *Abel* v. *Gousha,* 313 F. Supp. 1030 (E.D. Wis. 1970); *Lessard* v. *Van Dale,* 318 F. Supp. 74 (E.D. Wis.

1970); *Gouge* v. *Joint School District No. 1,* 310 F. Supp. 984 (W.D. Wis. 1970).

The Seventh Circuit did not refer to any of the above cases in rendering its opinion in this case. To allow its decision to stand would be to create utter confusion as to the rights of school boards and school districts within the circuit.

The opinion is clearly in conflict with the decisions of other United States Courts of Appeals which have properly followed the law as stated by this honorable court. We cite below decisions of the Courts of Appeals for the Second, Fifth and Ninth Circuits which unequivocally hold that educational agencies and school districts are not "persons" within the ambit of 42 U.S.C. §1983. See *Blanton* v. *State University of New York,* 489 F. 2d 377 (2nd Cir. 1973); *Campbell* v. *Masur,* 486 F. 2d 554 (5th Cir. 1973); *Butts* v. *Dallas Independent School District,* 436 F. 2d 728 (5th Cir. 1971); *Harkless* v. *Sweeny Independent School District,* 427 F. 2d 319 (5th Cir. 1970); *Harvey* v. *Sadler,* 331 F. 2d 387 (9th Cir. 1964). See also *Curtis* v. *Everette,* 489 F. 2d 516 (3rd Cir. 1973) (Pennsylvania Bureau of Corrections held not a "person" under §1983); *Henschel* v. *Worcester Police Dept.,* 445 F. 2d 624 (1st Cir. 1971) (police department); *Bennet* v. *California,* 406 F. 2d 36 (9th Cir. 1969) *cert. den.,* 394 U.S. 966 (1969) (state parole board).

Other District Courts have rendered similar decisions with respect to school districts. See *Kerr* v. *Clarenceville Sch. Dist. of Oakland and Wayne Ctys.,* 344 F. Supp. 1244 (E.D. Mich. 1972); *Wood* v. *Mt. Lebannon Township School District,* 342 F. Supp. 1293 (W.D. Pa. 1972).

III.

THE COURT BELOW HAS DECIDED AN IMPORTANT QUESTION OF STATE LAW IN DIRECT CONFLICT WITH THE APPLICABLE STATUTES OF THE STATE OF ILLINOIS AND THE OPINIONS OF THE ILLINOIS COURTS CONSTRUING STATE LAW.

The law of Illinois is clear that school districts and school boards are to have powers and functions analogous to those of municipalities and other units of local government; Art. VII §8 Illinois Constitution of 1970. The very existence of such school boards is mandated by the Illinois Constitution in order that the State provide "an efficient system of high quality public educational institutions and services," Art. X §1, Illinois Constitution of 1970. (The above constitutional provisions are reproduced verbatim in Appendix F).

The Illinois courts have long treated school boards as municipal corporations; *Crawford* v. *Board of Education District No. 88,* 215 Ill. App. 198 (1919); *Stroh et. al.* v. *Casner et. al.,* 201 Ill. App. 281 (1916).

The Illinois statutes further define school boards as municipal corporations. For this Court to hold that a school district is not a municipal corporation or quasi-municipal erporation within the meaning of *Monroe,* defies the very definition of the Illinois legislature. Chapter 24 §1-1-5 of the Illinois Rev. Statutes, the Illinois Municipal Code (as amended 1965), provides as follows:

> . . . In this section "municipal corporations or governmental subdivisions or districts" includes, but is not limited to, municipalities, townships, counties, school districts, park districts, sanitary districts, and fire protection districts. (See Appendix E)

The legislature gives equal treatment to municipalities and school districts in Chapter 85 Ill. Rev. Stats. where under "Local Public Entity" §1-206 provides:

> "Local public entity" includes a county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district and all other local governmental bodies. . . . (See Appendix E)

IV.

THE COURT BELOW HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioners strongly contend that they have valid grounds upon which to argue that this action should be dismissed. The Board of Education and those duly authorized to administer it are not proper defendants under 42 U.S.C. §1983. This contention has been before the District Court since the inception of this case.

However, the question of whether the School Board is a "person" under §1983 was not at issue on the appeal before the Court of Appeals. The plaintiffs-respondents did not brief or argue this point nor did we. The many cases cited above show that it has not been necessary for school districts, especially within the Seventh Circuit, to defend Civil Rights actions under §1983. Petitioners here demand the same treatment under the applicable law. For the Seventh Circuit to reverse this trend in our case without explanation and without giving us the opportunity to be heard is surely such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

The Petitioners here have done nothing to waive their right to argue the merits of this issue. This Court should reverse the holding of the Court of Appeals and if this case cannot be completely dismissed on this issue in this Court, the Petitioners should at least be given the opportunity to advance their arguments in the court below on remand.

CONCLUSION.

For the Reasons and Authorities presented, Petitioners pray that this Court issue a Writ of Certiorari.

Dated, Aurora, Illinois, March 18, 1974.

Respectfully submitted,

LAMBERT M. OCHSENSCHLAGER
REID, OCHSENSCHLAGER, MURPHY AND HUPP
75 South Stolp Avenue — P. O. Box 1368
Aurora, Illinois 60507
Telephone: (312) 892-8771

Attorney for Petitioners

ROBERT B. HUPP
WAYNE F. WEILER
REID, OCHSENSCHLAGER, MURPHY AND HUPP
Of Counsel

APPENDIX A

NO. 72 C 414
United States District Court,
N.D.Illinois, E.D.
November 14, 1972

MEMORANDUM OF DECISION

This cause has been brought by a group of teachers who charge that the defendant School Board, its members (in their individual and official capacities) and the Superintendent of Education violated the plaintiffs' civil rights while acting under the color of law. They allege violations of Title 42 U.S.C. Sec. 1983 and the First and Fourteenth Amendments of the United States Constitution. Jurisdiction is founded upon 28 U.S.C. Sec. 1343.

On June 9, 1971, the individual plaintiffs and other members of the Aurora Education Association East (A.E.A.E.) adopted a Resolution that the teachers in the School District would not return to the class room in the fall if there was no satisfactory settlement of a contract between the Board and the A.E.A.E. (Complaint, Par. 10). All the individual plaintiff teachers have attained contractural continued service or tenure.

In Illinois a tenured teacher must give notice of termination more than sixty (60) days prior to the beginning of the school term unless excused by agreement of the Board. (Chap. 122, Ill. Rev. Stat. Sec. 20-14). Any teacher terminating service at any other time is guilty of unprofessional conduct and liable to have his or her certificate suspended. None of the individual plaintiffs had given notice more than sixty (60) days prior to the beginning of the school term (July 1, 1971) and on the date of the aforesaid Resolution were duty bound to return to their teaching positions under their rights as tenured teachers. Tenured teachers continue to teach under the terms and provisions of the contract with the teachers during the last school term of their proba-

tionary period subject to the act and the lawful regulations of the Board of Education (Chap. 122, Ill. Rev. Stat. Sec. 24-11).

On June 21, 1971, each teacher in the School District received a letter from the Superintendent and was tendered a contract (Exhibits B and C to the Amended Complaint).

More than four hundred (400) of the teachers signed the contract and returned it to the Board of Education (Exhibit D in the Complaint). On July 29, 1971, each of the teachers who had not signed the tendered contract received another letter from the School District (Exhibit D) offering them the alternative of signing the new contract with increased benefits or returning to the District in accordance with their tenured rights. These individual plaintiffs again refused to sign the new contract. The individual plaintiffs returned in the fall and have continued to teach and have received their salaries in accordance with their last previous teaching contract.

The plaintiffs contend that taking all the facts together the action of the Board was calculated to chill the exercise of the plaintiffs' rights and was intended to destroy the Aurora Education Association East. We do not agree with this assertion.

This very same issue was raised in *Hanover Township Federation of Teachers, et al.* v. *Hanocer Community School Corporation, et al.*, 457 Fed. 2d 456 (7th Cir) (1972). The Court held that the plaintiffs threat of an illegal work stoppage in an effort to achieve economic benefits went beyond the constitutionally protected rights of expression. This principle is stated at pages 5-6 of its opinion.

> "Such protected 'union activities' include advocacy and persuasion in organizing the union and enlarg-

ing its membership, and also in the expression of its views to employees and to the public. For that reason, the state may not broadly condemn all union activities or discharge its employees simply because they join a union or participate in its activities. It does not follow, however, that all activities of a union or its members are constitutionally protected.

"Thus, the economic activities of a group of persons (whether representing labor or management) who associate together to achieve a common purpose are not protected by the First Amendment."

Taking each well pleaded fact in the Amended Complaint as true for the purposes of this Motion, there has been no statement of a claim upon which relief can be granted. The new contracts were offered to all teachers whether members of the A.E.A.E. or not. Every teacher had the opportunity to accept the new benefits or to stand upon their tenured rights and received the previous years salary. The choices were made not by the defendants but by the plaintiffs. Whatever economic loss they have sustained has been their free and voluntary act. They have not been censured, discharged, suspended or otherwise discriminated against. Defendants Motion to Dismiss the Amended Complaint is hereby granted and an appropriate Order has been entered.

/s/ William J. Lynch
Judge, United States District Court

Dated: Nov. 14, 1972.

In the United States Court of Appeals

For the Seventh Circuit

SEPTEMBER TERM, 1973 SEPTEMBER SESSION, 1973

No. 73-1085
AURORA EDUCATION ASSOCIATION EAST, ET AL.,
Plaintiffs-Appellants,
vs.
BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT No. 131 OF KANE COUNTY, ILLINOIS, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
72 C 414
WILLIAM J. LYNCH, *Judge.*

HEARD OCTOBER 17, 1973 — DECIDED DECEMBER 20, 1973

Before SWYGERT, *Chief Judge,* CUMMINGS, *Circuit Judge,* and WYZANSKI*, *Senior District Judge.*

WYZANSKI, *Senior District Judge.* Seven public school teachers in Aurora, Kane County, Illinois and the Aurora Education Association East, of which they are members, are plaintiffs. The Board of Education of Aurora Public School District No. 131 of Kane County, the members of that Board, and the Superintendent of Aurora's school system are defendants.

June 9, 1971, during collective bargaining and wage disputes between the teachers represented by the Association

* Senior District Judge Charles Edward Wyzanski, Jr., of the District of Massachusetts, is sitting by designation.

and the Board, the Association at one of its meetings adopted this resolution:

> "Be it resolved that the teachers of District #131 will not return to the classroom in the fall if there is at [that] time no satisfactory settlement of the contract between the Board of Education and the AEAE and further that an open meeting be held on September 2 for all teachers to assess the position of the AEAE at that time."

Thereupon the Board, dropping its negotiations for a collective bargain with the Association, wrote to each teacher a letter offering him or her an individual contract for the 1971-1972 school year. Each proposed contract provided that the contracting teacher expressly agreed that

> "(1) By urging, advocating, recommending, and asserting the right to strike by its members prior to the vote, and at the meeting held on June 9, 1971, the AEAE no longer qualifies as the organization that, under the established School Board Policy (1.30 Article II) [is] a bargaining representative of the teachers of the school system, and accordingly will not be recognized by the School Board as such agent for the teachers.
>
> "Nothing in this paragraph is intended to prevent the Teacher from belonging to the AEAE, but relates only to AEAE's lack of qualification to act as the bargaining agent for the Teacher in negotiations with the School Board."

In the foregoing, the citation of School Board Policy 1.30 Article II is a reference to a provision permitting a labor organization to negotiate, on behalf of teachers, with the Board, but excluding from all bargaining rights *"any organization (1) which asserts the right to strike against any . . . agency of the government, or to assist or to participate in any such strike, or which imposes a duty or obligation to conduct, assist or participate in any such strike. . . ."* This emphasized exclusory language is the focal point on which this case at bar turns.

Many teachers executed the proposed contract, and thus became entitled to advantages not offered in the 1970-1971

contracts. To the seven individual plaintiffs, none of whom executed the proferred contracts, the Board offered continued employment for the new year on the old terms. *Faute de mieux,* the seven continued at work under the disadvantageous 1970-1971 terms, and then brought this suit in the District Court.

Relying on the United States Constitution's Fourteenth Amendment's due process clause and its alleged incorporation of the principles of the First Amendment, and also invoking Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, plaintiffs sought (1) a declaration that, as here applied, School Board Policy 1.30 was invalid, and that plaintiff teachers were entitled to be placed on the same salary schedule and like terms as those teachers who had executed the proposed 1971-1972 contract, (2) an injunction protecting for the future the rights so declared, (3) back pay based on the 1971-1972 schedule, (4) $25,000 actual damages, (5) $25,000 exemplary damages, and (6) an attorney's fees and costs.

Defendants moved to dismiss the complaint on the grounds that (1) the complaint failed to state a valid claim, (2) plaintiffs' purported claims under 42 U.S.C. §1983 did not lie against the Board or its members, and (3) the Association was not a proper plaintiff to assert the alleged claim under 42 U.S.C. §1983.

On the ground that it failed to state a valid claim, the District Court dismissed the complaint. Relying upon *Hanover Township Federation of Teachers* v. *Hanover Community School Corp.,* 457 F.2d 456 (7th Cir. 1972), the Court's opinion held that the Board's proposed contracts for 1971-1972 and the Board's refusal to continue collective bargaining with the Association had not violated 42 U.S.C. §1983 or plaintiffs' claimed rights under the due process clause of the Fourteenth Amendment.

Plaintiffs appeal from the District Court's dismissal of their complaint.

We address ourselves to the already quoted exclusory provision in School Board Policy 1.30.

National Ass'n of Letter Carriers v. *Blount,* 305 F.Supp. 546 (D.D.C. 1969), appeal dismissed by stipulation, 400

U.S. 801 (1970) and *United Federation of Postal Clerks* v. *Blount*, 325 F.Supp. 879 (D.D.C.), *aff'd* mem. as to issues not here involved, 404 U.S. 802 (1971), invalidated virtually identical provisions in a federal statute and a federal administrative provision. The cited cases pointed out that the language is ambiguous, leaving it unclear whether it encompasses the mere philosophical or political assertion of the declarant's belief that he has a right to strike. A governmental inhibition against the declaration of such a purely theoretical position is a plain case of an unconstitutional official interference with freedom of speech and is unconstitutional. *Yates* v. *United States*, 354 U.S. 298 (1957). Where a governmental body seeks by an over broad regulation to preclude both lawful and unlawful speech, the regulation because of its overbreadth is a violation of guarantees of free speech and is unconstitutional. *Keyishan* v. *Board of Regents*, 385 U.S. 589 (1967).

We wholly agree with the analysis of the three-judge district courts in the opinions already mentioned. The Board's Policy 1.30 as here applied precludes a teacher from receiving a full salary and perquisites if, as a mere matter of dogma, he holds to the belief that teachers should be free to strike against governmental agencies. Such throttling of freedom of belief and of speech is contrary to that part of the First Amendment which is incorporated in the Fourteenth Amendment. We need no recital of literary authorities from John Milton to Harold J. Laski or of judicial luminaries from Justices Holmes, Brandeis, and Cardozo to Black, Frankfurter, and Harlan (to mention only the dead) to buttress the principle that the teacher, like any other citizen, is free to think as he likes, and to express those views academically provided action is not advocated but merely adumbrated. 42 U.S.C. §1983 gives a person protection against interference by state officials with that fundamental civil liberty.

Since the Board's Policy 1.30 seeks, *inter alia*, to prohibit constitutionally permissible free speech, it is because of its overbreadth, violative of the due process clause of the Fourteenth Amendment. *Keyishan* v. *Board of Regents*, *supra*.

Defendants and the District Court misconceive *Hanover Township Federation of Teachers* v. *Hanover Community*

School Corp., 457 F.2d 456 (7th Cir. 1972). Whatever else may be said about that case, it dealt with the question whether a public body is under a constitutional duty, apart from statute, to bargain collectively with the labor representative of its employees. There was no occasion to consider in that court, and the court did not consider, the problem of this case, that is, whether a public body may interfere with its employees' freedoms to think and to speak—which from the beginning of time have been recognized as wholly different from the freedom to associate and to seek to use the strength which comes from union in assembly and action. See Wyzanski, "The Open Window and the Open Door," 35 Cal. L. Rev. 336 (1947).

Defendants suggest miscellaneous grounds, not relied upon by the District Court, which they argue could have supported its dismissal of the complaint.

We note that at least one of the points pressed by defendants is unsound. The Board is not a municipal corporation and in that capacity is outside the coverage of 42 U.S.C. §1983, as construed in *Monroe* v. *Pape*, 365 U.S. 167 (1961).

There are other points, such as whether plaintiffs could recover the types of damage they claim, which do not go to the only issue before this court: that is, whether the complaint states a valid cause of action. We shall leave such points without comment until, if ever, they become the basis of a judgment entered by the District Court. It is not our function to issue the sort of declaratory judgment which would tell a District Judge how he should decide a hypothetical case which may or may not ultimately be supported by properly presented evidence and which may or may not be pressed to a conclusion by the litigants before that judge.

After the case was argued before us, and in accordance with discussions at our bar, the parties sought to settle this case. But no agreement was reached. Instead, unilaterally, defendants revised Subsection (1) of Article II of School Board Policy 1.30 to eliminate the language "asserts the right to strike against any local, state or federal agency of the government." This unilateral action is not the equivalent of a promise made to an adversary

as part of a settlement. Nor is it a stipulation made in court binding the declarant forever to adhere to a new policy based on a public confession of earlier unconstitutional action. Nor does it offer financial recompense to those plaintiffs who may have suffered damage caused by defendant's unlawful acts. Under these circumstances, plaintiffs have not lost their standing to invoke at least equitable relief, *Hecht Co.* v. *Bowles*, 321 U.S. 321 (1944), not to mention the continued vitality of their claim for monetary compensation, remedial and punitive.

The judgment of the District Court, dismissing the complaint, is reversed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX C

In the
United States Court of Appeals
For the Seventh Circuit

January 14, 1974.

Before

Hon. LUTHER M. SWYGERT, *Chief Judge*
Hon. WALTER J. CUMMINGS, *Circuit Judge*
Hon. CHARLES E. WYZANSKI, JR., *Sr. Circuit Judge*

AURORA EDUCATIONAL ASSOCIATION, EAST, et al.,
Plaintiffs-Appellants,

No. 73-1085 vs.

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT No. 131, etc., et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
(72 C 414)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

APPENDIX D

TITLE 28, UNITED STATES CODE

§ 1343. Civil rights and elective franchise

The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

(1) To recover damages for injury to his person or property, or because of the deprivation of any right or privilege of a citizen of the United States, by any act done in furtherance of any conspiracy mentioned in section 1985 of Title 42;

(2) To recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in section 1985 of Title 42 which he had knowledge were about to occur and power to prevent;

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

(4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

TITLE 42, UNITED STATES CODE

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be sujected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

§ 1984. Same; review of proceedings

All cases arising under the provisions of this Act in the courts of the United States shall be reviewable by the Supreme Court of the United States, without regard to the sum in controversy, under the same provisions and regulations as are provided by law for the review of other causes in said court.

APPENDIX E

ILLINOIS REVISED STATUTES, CHAPTER 24

§ 1-1-5. Joint exercise of power

The corporate authorities of each municipality may exercise jointly, with one or more other municipal corporations or governmental subdivisions or districts, all of the powers set forth in this Code unless expressly provided otherwise. In this section "municipal corporations or governmental subdivisions or districts" includes, but is not limited to, municipalities, townships, counties, school districts, park districts, sanitary districts, and fire protection districts. As amended 1965, Aug. 10, Laws 1965, p. 2854, §1.

ILLINOIS REVISED STATUTES, CHAPTER 85

§ 1-206. Local public entity

"Local public entity" includes a county, township, municipality, municipal corporation, school district, school board, forest preserve district, park district, fire protection district, sanitary district, and all other local governmental bodies. It does not include the State or any office, officer, department, division, bureau, board, commission, university or similar agency of the State.

ILLINOIS REVISED STATUTES, CHAPTER 122

§ 24-11. Boards of Education — Boards of School Inspectors — Contractual continued service

As used in this and the succeeding sections of this Article, "teacher" means any or all school district employees regularly required to be certified under laws relating to the certification of teachers, "board" means board of education or board of school inspectors, as the case may be and "school term" means that portion of the school year, July 1 to the following June 30, when school is in actual session. This and the succeeding sections of this Article apply only to school districts having less than 500,000 inhabitants, other than those described in Section 24-10.

Any teacher who has been employed in any district as a full-time teacher for a probationary period of 2 consecutive school terms shall enter upon contractual continued service unless given written notice of dismissal stating the specific reason therefor, by registered mail by the employing board at least 60 days before the end of such period. If, however, a teacher has not had 1 school term of full-time teaching experience prior to the beginning of such probationary period, the employing board may at its option extend such probationary period for 1 additional school term by giving the teacher written notice by registered mail at least 60 days before the end of the second school term of the period of 2 consecutive school terms referred to above.

Contractual continued service shall cease at the end of the school term following the 65th birthday of any teacher, and any subsequent employment of such a teacher shall be on an annual basis.

Contractual continued service shall continue in effect the terms and provisions of the contract with the teacher during the last school term of the probationary period, subject to the provisions of this Act and the lawful regulations of the employing board. This section and succeeding sections do not modify any existing power of the board except with respect to the procedure of the discharge of a teacher and reductions in salary as hereinafter provided. Contractual continued service status shall not restrict the power of the board to transfer a teacher to a position which the teacher is qualified to fill or to make such salary adjustments as it deems desirable, but unless reductions in salary are uniform or based upon some reasonable classification, any teacher whose salary is reduced shall be entitled to a notice and a hearing as hereinafter provided in the case of certain dismissals or removals.

§ 24-14. Termination of contractual continued service by teacher

No teacher who has entered upon contractual continued service may terminate such service during the part of the school year when school is in session nor for a period of 60 days just previous to the beginning of the school term except by agreement of the board and the teacher. No teacher entered upon contractual continued service shall be permitted to terminate it during any other part of the school year except by service upon the secretary of the board of written notice of the termination. Any teacher terminating said service not in accordance with this section is guilty of unprofessional conduct and liable to suspension of certificate, as provided under the law relating to the certification of teachers, for a period not to exceed 1 year.

APPENDIX F

ILLINOIS CONSTITUTION 1970, ARTICLE VII

§ 8. Powers and Officers of School Districts and Units of Local Government other than Counties and Municipalities

Townships, school districts, special districts and units, designated by law as units of local government, which exercise limited governmental powers or powers in respect to limited governmental subjects shall have only powers granted by law. No law shall grant the power (1) to any of the foregoing units to incur debt payable from ad valorem property tax receipts maturing more than 40 years from the time it is incurred, or (2) to make improvements by special assessments to any of the foregoing classes of units which do not have that power on the effective date of this Constitution. The General Assembly shall provide by law for the selection of officers of the foregoing units, but the officers shall not be appointed by any person in the Judicial Branch.

ILLINOIS CONSTITUTION 1970, ARTICLE X

§ 1. Goal — Free Schools

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.

SUPR... APR 19 1974
MICHAEL RODAK, JR., CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1408

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT NO. 131 OF KANE COUNTY, ILLINOIS; BONNIE SCHOEPPEL, HENRY W. COWHERD, JR., FRANK N. HETTINGER, ERVIN C. KIESO, ALBERT PLATT, STUART J. SHOGER and LEO KISH, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; ANDREW J. HOOK, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois,

Petitioners,

vs.

AURORA EDUCATION ASSOCIATION EAST, DON IRELAND, JEANETTE SMITH, DAVE COLE, BERNIE ZIELIE, DIANA PARKER, LEROY OLSON and CAROLE DAVEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STEPHEN J. POLLAK
RALPH J. MOORE, JR.
WILLIAM S. MOORE
734 Fifteenth St., N.W.
Washington, D.C. 20005

R. W. DEFFENBAUGH
804 Myers Building
Springfield, Illinois 62701

DAVID RUBIN
1201 Sixteenth St., N.W.
Washington, D.C. 20036
Attorneys for Respondents

Of Counsel:

SHEA & GARDNER
734 Fifteenth St., N.W.
Washington, D.C. 20005

DRACH, TERRELL AND
DEFFENBAUGH, P.C.
804 Myers Building
Springfield, Illinois 62701

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1408

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT NO. 131 OF KANE COUNTY, ILLINOIS; BONNIE SCHOEPPEL, HENRY W. COWHERD, JR., FRANK N. HETTINGER, ERVIN C. KIESO, ALBERT PLATT, STUART J. SHOGER and LEO KISH, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; ANDREW J. HOOK, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois,

Petitioners,

vs.

AURORA EDUCATION ASSOCIATION EAST, DON IRELAND, JEANETTE SMITH, DAVE COLE, BERNIE ZIELIE, DIANA PARKER, LEROY OLSON and CAROLE DAVEY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 4a-9a) is not yet officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

Whether the Court of Appeals erred in holding that petitioner Board of Education is not immune from suit under 42 U.S.C. § 1983.

STATEMENT OF THE CASE

This is an action by seven public school teachers and the Aurora Education Association East ("Association" or "AEAE"), of which the seven teachers are members, against the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois, the members of the Board, and the superintendent of the Aurora public school system.

On June 9, 1971, in the course of contract negotiations with the Board, the Association adopted the following resolution:

> "Be it resolved that the teachers of District #131 will not return to the classroom in the fall if there is at [that] time no satisfactory settlement of the contract between the Board of Education and the AEAE and further that an open meeting be held on September 2 for all teachers to assess the position of the AEAE at that time" (Pet. App. 4a-5a).

The Board thereupon discontinued negotiations with the Association and wrote each teacher a letter proffering an individual contract for the 1971-72 school year. The

proffered contracts provided that the contracting teacher expressly agreed that

> "[b]y urging, advocating, recommending, and asserting the right to strike by its members . . . on June 9, 1971, the AEAE no longer qualifies as the organization that, under the established School Board Policy (1.30 Article II) [is] a bargaining representative of the teachers of the school system, and accordingly will not be recognized by the School Board as such agent for the teachers" (Pet. App. 5a).

Board Policy 1.30 purports to exclude from representation rights "any organization which asserts the right to strike against any . . . agency of the government, or to assist or to participate in any such strike, or which imposes a duty or obligation to conduct, assist, or participate in any such strike . . ." (Pet. App. 5a).

Although many other teachers accepted the proffered contracts, the seven individual respondents did not and in consequence were required to teach during the 1971-72 school year on the 1970-71 terms. Accordingly, the seven teachers and the Association commenced this action in the District Court. (Pet. App. 5a-6a.)

In their complaint, respondents claimed that the Board's actions violated their rights under the due process clause of the Fourteenth Amendment as it incorporates the principles of the First Amendment. In addition, they claimed that the Board's actions violated their rights under 42 U.S.C. § 1983. They therefore sought a declaration that School Board Policy 1.30 is invalid as applied and that they are entitled to the same pay and benefits as other teachers; injunctive relief against continued violations of their rights; back pay based on the 1971-72 schedule; actual and exemplary damages; and attorneys' fees and costs. (Pet. App. 6a.)

Petitioners moved to dismiss the complaint on three grounds—(1) that the complaint failed to state a valid

claim; (2) that petitioners are not subject to suit under 42 U.S.C. § 1983; and (3) that the Association is not a proper plaintiff to assert the claims alleged under Section 1983 (Pet. App. 6a).

The District Court dismissed the complaint for failure to state a valid claim (Pet. App. 6a). On appeal the Court of Appeals reversed, holding that "Policy 1.30 seeks, *inter alia*, to prohibit constitutionally permissible free speech," and therefore, "because of its overbreadth," is "violative of the due process clause of the Fourteenth Amendment" (Pet. App. 7a). Petitioners have not asked this Court to review that determination (Pet. 9).

As noted above, however, petitioners had moved to dismiss on two additional grounds, one of which was their claim that they are immune from suit under Section 1983. In their brief on appeal, petitioners urged this contention upon the Court of Appeals, asserting that it justified dismissal of the complaint. A copy of the relevant section of petitioners' brief in the Court of Appeals is reproduced in Appendix A to this brief. Respondents replied in their reply brief and following this Court's decision in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), called that decision to the attention of the Court of Appeals by letter, a copy of which is reprinted in relevant part in Appendix B hereto. The Court of Appeals rejected petitioners' contention, stating—

> "Defendants suggest miscellaneous grounds, not relied upon by the District Court, which they argue could have supported its dismissal of the complaint.
>
> "We note that at least one of the points pressed by defendants is unsound. The Board is not a municipal corporation and in that capacity outside the coverage of 42 U.S.C. § 1983, as construed in *Monroe* v. *Pape*, 365 U.S. 167 (1961)" (Pet. App. 8a).

Petitioners seek to have this Court review that determination. After filing their petition for certiorari,

petitioners filed a new motion to strike and dismiss in the District Court with a supporting memorandum in which they renewed their contention that the Board is immune from suit under Section 1983 and stated that the statement of the Court of Appeals quoted above, which they have asked this Court to review, is a "mere dictum and not binding on this [district] court."

ARGUMENT

There is no occasion for review by this Court. It is not true that petitioners were not "given an opportunity to argue or brief the issue" (Pet. 11) as to which they seek review; they tendered that issue to the Court of Appeals for decision in their brief on appeal below. The decision below does not conflict with applicable decisions of this Court or with decisions in other circuits cited by petitioners. The claim that this Court should grant certiorari because "the Court below has decided an important question of state law in direct conflict with the applicable statutes of the State of Illinois and the opinions of the Illinois courts construing state law" (Pet. 15) presents only a question of Illinois law as to which petitioners are incorrect. And even if the question petitioners seek to present were otherwise worthy of review, review at this interlocutory stage of the proceedings would be inappropriate, because, among other reasons, the question presented may well prove to be academic in this case.

1. It is important at the outset to dispel the incorrect claim that the Court below "gratuitously" decided the issue as to which petitioners seek review without giving petitioners the opportunity to be heard (Pet. 11, 16-17).

Petitioners assert that "[n]either the petitioners nor the respondents herein were given an opportunity to argue or brief the issue which the Court of Appeals gratuitously decided" (Pet. 11). They go on to claim

that the question "whether the School Board is a 'person' under § 1983 was not at issue on the appeal before the Court of Appeals" (Pet. 16). They represent that the "plaintiffs-respondents did not brief or argue this point nor did we" (Pet. 16). They contend that this alleged departure "from the accepted and usual course of judicial proceedings" (Pet. 11, 16) denied them "due process" (Pet. 11) and "calls for an exercise of this Court's power of supervision" (Pet. 11, 16). They conclude that they "should at least be given the opportunity to advance their arguments in the court below on remand" (Pet. 17).

The fact is that in Part IV of their brief in the court below, petitioners tendered and briefed the issue about which they now complain (App. A). Respondents answered on pages 8-11 of their reply brief. After this Court decided *City of Kenosha* v. *Bruno*, *supra*, respondents called that decision to the attention of the Court of Appeals (App. B). In addition, petitioners reiterated their claim at length in a petition for rehearing which was denied. Thus, petitioners' claims in this regard simply do not square with the facts.

2. Contrary to petitioners' contentions, the decision below is not in "direct conflict with the applicable decisions of this Court," which are said to be *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Moor* v. *County of Alameda*, 411 U.S. 693 (1973); and *City of Kenosha* v. *Bruno*, *supra*, 412 U.S. 507 (1973). Those three decisions held that *cities* and *counties* are immune from suit under Section 1983. They did not involve *boards of education* and thus there is no "direct conflict with the applicable decisions of this Court."

The considerations that affect the question of the immunity of cities and counties are different from those that affect the question of possible immunity of school districts and certainly of boards of education. The relevant legislative history—the rejection of the Sherman

Amendment summarized in *Monroe* v. *Pape, supra*, 365 U.S., at 187-190—concerned the proposed imposition of liability on "the inhabitants of *the county, city or parish*" for acts of violence by persons over whom the inhabitants have no control. *Id.*, at 188. The Amendment did not involve the problems of school districts, and certainly has no relevance to the question whether a board of individuals, who themselves are subject to suit under Section 1983,[1] can be sued for its actions. Such actions are governed, not by *Monroe, Moor* and *Kenosha*, but by the many decisions of this Court authorizing relief under Section 1983 against local boards of education.[2]

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[1] See *Scheuer* v. *Rhodes*, No. 72-914 (U.S., April 17, 1974) (Slip op. 3-4, 5-6); *Edelman* v. *Jordan*, 42 U.S.L.W. 4419, 4427 (March 25, 1974). The holdings in *Monroe, Moor*, and *Kenosha* were based on legislative history which indicated explicitly that cities and counties were exempt from suit under Section 1983 while officials acting for those entities were not. See, *e.g.*, *Monroe, supra*, 365 U.S. at 175-77, 190-91; *Moor, supra*, 411 U.S. at 708 n.24; *City of Kenosha, supra*, 412 U.S. at 512, 514. Thus, in *Kenosha*, the Supreme Court emphasized that "the only defendants named in the complaints . . . were . . . municipalities," and limited its holding to municipalities (412 U.S. at 512, 514). In *Ex parte Young*, 209 U.S. 123, 159-60 (1908), this Court held that government officials can be sued even when the governmental entities they represent are immune from suit under the Eleventh Amendment. The same principle has been followed in numerous decisions under Section 1983, most recently in *Scheuer, supra*. *E.g.*, *Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Donahue* v. *Stanton*, 471 F.2d 482 (7th Cir., 1972); *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319, 323 (5th Cir., 1970); *Diamond* v. *Pitchess*, 411 F.2d 565 (9th Cir., 1969); *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir., 1968); *Board of Trustees of Arkansas A. & M. College* v. *Davis*, 396 F.2d 730, 734 (8th Cir., 1968).

[2] This is clearly demonstrated by two decisions handed down since *Kenosha* in which the Court allowed relief under Section 1983 aganst boards of education. *Cleveland Board of Education* v. *LaFleur*, 42 U.S.L.W. 4186, 4187, 4188 (Jan. 21, 1974); *Keyes* v. *School District No. 1*, 413 U.S. 189 (1973) (see 445 F.2d 990, 994; 303 F. Supp. 289, 296). For decisions prior to *Kenosha* which also authorized relief in such cases, see, *e.g.*, *Papish* v. *Board of Curators*

3. Petitioners claim that the holding below conflicts with decisions in the Second, Fifth and Ninth Circuits (Pet. 14). However, those decisions do not hold that local boards of education cannot be sued under Section 1983, and thus there is no conflict.

Petitioner rely on *Blanton* v. *State University of New York*, 489 F.2d 377 (2d Cir., 1973), from the Second Circuit. In that case the Court of Appeals held that a state university cannot be sued under Section 1983. That holding concerns the question whether Congress intended *states*, and therefore *state* agencies, to be immune from suit under Section 1983. That question involves considerations akin to those that underlie the Eleventh Amendment, which bars suits against the states but not against local governmental subdivisions. See *Edelman* v. *Jordan*, 42 U.S.L.W. 4419, 4424 n. 12 (March 25, 1974). Those considerations were not involved in the battle over the Sherman Amendment concerning cities, counties and parishes. Thus, the question of state immunity under Section 1983 is quite different from the question presented here—whether a *local* board of education is immune from suit under Section 1983.

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of the University of Missouri, 410 U.S. 667, 668-69 (1973); *Raney* v. *Board of Education*, 391 U.S. 443 (1968) (see 381 F.2d 282, 283); *Goss* v. *Board of Education of Knoxville*, 373 U.S. 683 (1963) (see 301 F.2d 164, 165); *McNeese* v. *Board of Education, School District 187*, 373 U.S. 668, 671-72 (1963). See also, Kates & Kouba, *Liability of Public Entities Under Section 1983 of the Civil Rights Acts*, 45 So. Calif. L. Rev. 131, 152-55 (1972); *The Supreme Court, 1972 Term*, 87 Harv. L. Rev. 57, 258-60 (1973).

We note that this Court often makes distinctions among governmental entities based upon an analysis of the nature and powers of the different entities and the statutory or constitutional goals at stake. *E.g.*, *Salyer Land Company* v. *Tulare Lake Basin Water Storage District*, 410 U.S. 719, 726-30 (1973) (distinguishing for "one-man, one vote" purposes between governmental subdivisions with only "limited authority" and others with "general" authority); *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 98 (1972) (holding that "the term 'States' as used in 28 U.S.C. § 1251(a)(1) should not be read to include their political subdivisions").

Petitioners rely on three decisions from the Fifth Circuit—*Campbell* v. *Masur*, 486 F.2d 554 (5th Cir., 1973); *Butts* v. *Dallas Independent School District*, 436 F.2d 728 (5th Cir., 1971); and *Harkless* v. *Sweeny Independent School District*, 427 F.2d 319 (5th Cir., 1970). *Butts* and *Harkless* were decided before this Court's decisions last term in *Moor* and *Kenosha*, while *Campbell* is more recent. In *Butts* and *Harkless*, the Court of Appeals held that school districts in Texas can be sued for equitable relief under Section 1983, although it did state that such districts could not be sued for damages because they are "in the nature of" municipalities. (427 F.2d, at 321; see 436 F.2d, at 729.) The statements as to suits for damages concerned suits against school districts, *i.e.*, political subdivisions, not boards of education, and in any event were dicta. Moreover, the Court of Appeals' view that school districts in Texas were "in the nature of" municipalities was specifically based on an analysis of Texas law. 427 F.2d, at 321. More recently, in *Campbell*, the Court of Appeals was presented with the question whether a school district in Texas can be sued under Section 1983 for wrongful discharge. Instead of deciding the question itself, the Court remanded the case for reexamination in the light of *Kenosha*. Thus, the Fifth Circuit has not yet resolved the question of immunity of school districts under Section 1983 and has not even considered the question petitioners seek to present—the possible immunity of *boards of education*. Accordingly, the decision below does not conflict with the Court of Appeals' decisions in the Fifth Circuit.

Finally, petitioners rely on *Harvey* v. *Sadler*, 331 F.2d 387 (9th Cir., 1964), a pre-*Kenosha* decision in the Ninth Circuit. In that case, the Court of Appeals held that a California school district cannot be sued for damages under Section 1983. The Court of Appeals did not decide, however, whether a *board of education* can be sued

under Section 1983, and thus there is no conflict between that decision and the decision below. As discussed above, school districts—political subdivisions—are different from boards of education, the bodies of individuals who govern such districts.

Thus, the holding below that a board of education in Illinois is subject to suit under Section 1983 does not conflict with decisions in other circuits cited by the petitioners.

4. Petitioners contend further that the "court below has decided an important question of State law in direct conflict with the applicable statutes of the State of Illinois and opinions of the Illinois courts construing State law" (Pet. 15). There are no Illinois state court decisions as to the amenability of boards of education to suit under Section 1983, and therefore there could not possibly be a "direct conflict" between Illinois state court decisions and the decision below. The contention that this Court sits to review questions of Illinois law requires no response. See Stern & Gressman, Supreme Court Practice, § 4.10 (4th ed., 1969). We note, moreover, that petitioners rely on two Illinois statutes of very limited application and fail to call the Court's attention to much more important provisions in the Illinois Code. Thus, they cite a provision in the Illinois Tort Immunity Law that treats school districts as "local public entities" for purposes of tort immunity only (Ill. Rev. Stat., ch. 85 § 1-206). They also cite a section in the Illinois Municipal Code that provides for the joint exercise of powers by "municipal corporations or governmental subdivisions or districts," and that states that "*in this section* 'municipal corporations or governmental subdivisions or districts' includes municipalities, townships, counties," and various governmental districts including "school districts" (Ill. Rev. Stat., ch. 24 § 1-1-5, emphasis added). However, petitioners are silent about the provisions of the same

Illinois Municipal Code that are of general application. Those provisions state that "unless the context otherwise provides 'municipal' or 'municipality' does not include a . . . school district" (Ill. Rev. Stat., ch. 24 § 1-1-2(1)). Thus, petitioners' unqualified assertion that boards of education are municipal corporations under Illinois law is not accurate. Boards of education differ from municipal corporations under Illinois law in important ways.[3]

5. There are at least two reasons why the question petitioners seek to present may well prove to be academic in this case, and thus why the decision below does not warrant review, certainly at this interlocutory stage of the proceedings. In the first place, the individual members of the Board of Education have all been named as defendants. Therefore, even if the holding below as to the Board were reversed, respondents may obtain much and perhaps all the relief they seek by way of a judgment against the Board's individual members. See n. 1, *supra*. In the second place, a holding that the Board cannot be sued under Section 1983 would not mean that the complaint against the Board should be dismissed. Even if respondents were held to lack a cause of action against the Board under Section 1983, the claim that the Board violated respondents' constitutional rights is within the jurisdiction of the District Court under 28 U.S.C. § 1343(3).[4] And even if that were not true, respondents

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[3] Compare Illinois School Code, Ill. Rev. Stat., ch. 122, which prescribes the duties and powers of boards of education (§§ 10-10, 10-20 et seq., 10-21 et seq.), with Illinois Municipal Code, Ill. Rev. Stat., ch. 24, which prescribes the duties and powers of municipal corporations.

[4] 28 U.S.C. § 1343(3) grants District Courts jurisdiction over "any civil action authorized by law . . . [t]o redress the deprivation under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . . ." This Court has recognized that the Constitution may give rise directly to causes of action for monetary and equitable remedies for constitutional violations. *E.g.*,

nevertheless may establish jurisdiction under 28 U.S.C. § 1331. *E.g.*, *City of Kenosha* v. *Bruno*, *supra*, 412 U.S., at 514.[5]

In these circumstances, the case is not ripe for review. After rejecting petitioners' contention that petitioner Board of Education cannot be sued under Section 1983, the court below sent the case back to the district court for a determination of the remaining issues presented by the motion to dismiss, and the ultimate merits of the case if the motion is denied. Therefore, the question whether respondents can sue petitioner Board of Education under Section 1983 may well be moot when a final judgment is entered. In cases in this posture, this Court grants review only for exceptional reasons, none of which exist in this case. *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R. Co.*, 389 U.S. 327, 328 (1967)

Bivens v. *Six Unknown Named Agents*, 403 U.S. 388 (1971); *Bell* v. *Hood*, 327 U.S. 678 (1946). Thus, even if petitioners are right in contending that respondents lack a cause of action against the Board under Section 1983, respondents nevertheless have pleaded a cause of action under the Constitution, within the jurisdiction of the District Court under Section 1343(3). See *Moyer* v. *Peabody*, 212 U.S. 78, 83 (1909) ("the question is whether this is a suit authorized by law, that is by [Section 1983] or the Constitution, or both").

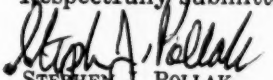
[5] The complaint does not state that the jurisdictional amount required by § 1331 is met. However, both the respondent Association and the respondent teachers have suffered monetary damage as a result of petitioners' actions (see App. B, pp. 6a-7a, *infra*), and the constitutional interests asserted by the petitioners—the invaluable rights of speech and assembly—are worth more than $10,000. See *Spock* v. *David*, 469 F.2d 1047, 1052-53 (3d Cir., 1972); *Cortwright* v. *Resor*, 325 F. Supp. 797, 810 (E.D.N.Y.), *rev'd on other grounds*, 447 F.2d 245 (2d Cir., 1971); *West End Neighborhood Corp.* v. *Stans*, 312 F. Supp. 1066, 1068 (D.D.C., 1970). In these circumstances, at this pretrial stage of the proceedings, leave to amend to allege jurisdictional requisites should be freely granted under F.R.C.P. 15(a). *E.g.*, *United Steelworkers* v. *Mesker Bros. Industries, Inc.*, 457 F.2d 91, 93 (8th Cir., 1972); 3 Moore, Federal Practice, ¶ 15.09 (2d ed., 1974); see also *Eklund* v. *Mora*, 410 F.2d 731 (5th Cir., 1969); 3 Moore, *supra*, ¶ 15.11, at 969.

("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); Stern & Gressman, Supreme Court Practice, § 4.19 (4th ed., 1969).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,



STEPHEN J. POLLAK
RALPH J. MOORE, JR.
WILLIAM S. MOORE
734 Fifteenth St., N.W.
Washington, D.C. 20005

Of Counsel:

SHEA & GARDNER
734 Fifteenth St., N.W.
Washington, D.C. 20005

DRACH, TERRELL AND
DEFFENBAUGH, P.C.
804 Myers Building
Springfield, Illinois 62701

R. W. DEFFENBAUGH
804 Myers Building
Springfield, Illinois 62701

DAVID RUBIN
1201 Sixteenth St., N.W.
Washington, D.C. 20036
Attorneys for Respondents

APPENDIX A

Part IV of Brief for Defendants-Appellees
in the United States Court of Appeals
for the Seventh Circuit, pp. 10-11

THERE ARE NUMEROUS OTHER DEFICIENCIES IN THE COMPLAINT WHICH HAVE BEEN RAISED IN THE MOTION WHICH JUSTIFIES DISMISSAL. THE PLAINTIFFS MADE NO REFERENCE TO THEM IN THEIR BRIEF.

The Board of Education, being a body municipal in nature, is not a "person" within the meaning of the Civil Rights Act. *Monroe* vs. *Papa*, 365 U.S. 167 (1961).

The individual defendants have been sued both individually and in their official capacity for money damages. The actions complained of, however, occurred in the discharge of their official duties. Such an action cannot be maintained. This question was considered in *Abel* vs. *Gousha*, 313 F. Supp. 1030 (DCED, Wisc. 1970) where the Court said at page 1031:

> "Although the members of the school board are also sued in their individual capacities, the gravamen of the complaint is that they acted improperly as a corporate body in discharging the plaintiff. No individual action by any member of the board is complained about by the plaintiff. In my opinion the complaint does not state a cause of action against the individual members of the board, and they are entitled to dismissal as individuals. However, as the board of school directors, they must remain in the action with respect to the claim for reinstatement."

A similar issue was considered in *Henson* vs. *City of St. Francis*, 322 F. Supp. 1034. The teachers in that case complained that they did not have their contracts

renewed and received no explanation therefore. The Court said at pages 1036-1037:

> "To the extent that the plaintiffs seek damages against the school board, the action must be dismissed. These defendants are not "persons" within the meaning of that term as used in 42 U.S. §§ 1983 and 1985.

To the extent that equitable relief is sought, the injunction prayed for (to place the teachers on the higher salary schedule) is mandatory in nature and is the equivalent of a money judgment which has been ruled improper in the *Abel* and *Henson* cases. Equitable relief is clearly unnecessary.

APPENDIX B

SHEA & GARDNER
734 Fifteenth Street, N.W.
Washington, D. C. 20005

October 4, 1973

Mr. Kenneth J. Carrick
Clerk
United States Court of Appeals
United States Court House
219 South Dearborn Street
Chicago, Illinois 60604

Re: Aurora Education Ass'n East v. Board of Education of Aurora Public School Dist., No. 73-1085

Dear Mr. Carrick:

In June, after the Aurora Education Association East had filed its reply brief in this case, the Supreme Court handed down two decisions which bear directly upon the issues before this Court. These are: *Broadrick* v. *Oklahoma*, 41 U.S.L.W. 5111 (June 25, 1973), which deals with unconstitutional overbreadth of statutes affecting First Amendment rights; and *City of Kenosha* v. *Bruno*, 41 U.S.L.W. 4819 (June 11, 1973), which holds that municipalities are not subject to suit under 42 U.S.C. § 1983. We wish in this letter to bring to the Court's attention the following comments on these cases.

1. *Broadrick* v. *Oklahoma: Overbreadth Under the First Amendment.*

* * * *

2. *City of Kenosha: Suability Under 42 U.S.C. § 1983.*

In *City of Kenosha*, the Supreme Court held that cities

were not suable in an action for equitable relief brought under 42 U.S.C. § 1983. It had already held in *Monroe* v. *Pape*, 365 U.S. 167 (1961), that that section does not create a cause of action for damages against cities. See also *Moor* v. *County of Alameda*, 41 U.S.L.W. 4627 (May 14, 1973) (same result with regard to counties).

City of Kenosha raises a question whether the Aurora school board is suable under Section 1983. While we take the position that it is, this question need not be resolved here. This is so because the complaint names other defendants who are suable under that section—the school superintendent and the members of the school board (App. 1)—and the Court can therefore proceed to decide the constitutional issues presented in the case and leave the question of the suability of the school board for resolution on remand with full briefing and development of the facts.

City of Kenosha, *Monroe* and *Moor* do not affect the suability of the school superintendent and the members of the school board under Section 1983. Their holdings were based on legislative history which indicated explicitly that cities and counties were exempted from suit under Section 1983 while officials acting for those entities were not.[3] See, *e.g.*, *Monroe* v. *Pape*, *supra*, 365 U.S. at 175-77, 190-91; *Moor* v. *County of Alameda*, *supra*, 41 U.S.L.W. at 4632 n. 24. *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), establishes that government officials can be sued even where the government entities for which they acted are immune. This principle is reflected in decisions of this Court in Section 1983 cases involving both legal and equitable relief. Thus, in *McLaughlin* v. *Tilendis*, 398 F.2d 287 (7th Cir. 1968), and *Donahue* v. *Stanton*, 471 F.2d 482 (7th Cir. 1972), both decided

[3] In its opinion in *City of Kenosha*, the Supreme Court emphasized that "[t]he only defendants named in the complaints . . . were . . . municipalities" (41 U.S.L.W. at 4821), and limited its holding to municipalities.

after *Monroe*, this Court held that damages could be awarded against school board members *(McLaughlin)* and hospital officials *(Donahue)* under Section 1983. See Reply Brief at 10-11. And in *Donahue*, the Court also held that the hospital officials could be ordered to reinstate a former chaplain of the hospital, who had been wrongfully discharged. To the same effect, see *Harkless* v. *Sweeney Independent School Dist.*, 427 F.2d 319, 323 (5th Cir. 1970); *Diamond* v. *Pitchess*, 411 F.2d 565 (9th Cir. 1969); *Board of Trustees of Arkansas A & M College* v. *Davis*, 396 F.2d 730, 734 (8th Cir. 1968). In sum, there can be no doubt that Section 1983 creates a cause of action against the individual members of the school board and the school superintendent.

If the Court should pass on the question whether plaintiffs also have a cause of action against the school board under Section 1983, it should hold that they do. *City of Kenosha*, *Monroe* and *Moor* dealt only with the suability of cities and counties under Section 1983 and were grounded in that statute's legislative history indicating that Congress did not intend to authorize a cause of action against these parties. 41 U.S.L.W. at 4821; *id.* at 4632; 365 U.S. at 187-92. That history is not directly applicable to school boards, and the holdings in *City of Kenosha*, *Monroe* and *Moor* therefore should not be extended to grant them immunity from suit under Section 1983. See *Scher* v. *Board of Education*, 424 F.2d 741, 743-44 (3d Cir. 1970) (*Monroe* distinguished on grounds suit was against a school board, not a city); *Kates* and *Kouba*, "Liability of Public Entities Under Section 1983 of the Civil Rights Act," 45 *So. Calif. L. Rev.* 131, 152-55 (1972).

In any event, the Aurora School Board is properly before the Court on other grounds. As stated in their complaint, the association and plaintiff teachers have causes of action against it under the First and Fourteenth Amendments. See, *e.g.*, *Brown* v. *Board of Edu-*

cation, 347 U.S. 483 (1954); see also *City of Kenosha* v. *Bruno*, *supra*, 41 U.S.L.W. at 4821-22. And jurisdiction over those causes of action lies under 28 U.S.C. § 1343(3) which grants United States District Courts jurisdiction over civil actions authorized by law:

> "[t]o redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege, or immunity secured by the Constitution of the United States. . . ."

Robles v. *El Paso Community Action Agency, Project Bravo, Inc.*, 456 F.2d 189 (5th Cir. 1972); *Paul* v. *Dade County*, 419 F.2d 10, 11-12 (5th Cir. 1969); see *Moyer* v. *Peabody*, 212 U.S. 78, 83 (1909) ("the question is whether this is a suit authorized by law, that is, by [Section 1983], or the Constitution, or both"); but see *Giancana* v. *Hoover*, 322 F.2d 789 (7th Cir. 1963).[4] Jurisdiction over plaintiffs' constitutional claims is also conferred by 28 U.S.C. § 1331, which provides:

> "The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs; and arises under the Constitution, laws, or treaties of the United States."

These claims clearly arise under the Constitution. See, *e.g.*, *Powell* v. *McCormack*, 395 U.S. 486, 515-16 (1969); *Bell* v. *Hood*, 327 U.S. 678 (1946). The other prerequisite of Section 1331—that "the matter in controversy exceeds the sum or value of $10,000"—is also satisfied. The right which the association seeks to vindicate in this action exceeds $10,000 in value, for by refusing to recognize it as the bargaining representative of the teachers in the Aurora school system, the school board deprived the association of its primary reason for existing. The requi-

[4] In *City of Kenosha* the Supreme Court did not consider whether, wholly apart from Section 1983, the district court had jurisdiction under Section 1343(3) over the constitutional claims raised in that case. This possibility was apparently not called to its attention.

site jurisdictional amount is also met with regard to plaintiff teachers. Each loses a substantial sum every year he is denied his rightful position in the standard schedule of salaries and benefits. Courts take into account the amount of future earnings and benefits which an employee will lose as a result of a discharge or reduction in salary. See *Nord* v. *Griffin*, 86 F.2d 481, 483 (7th Cir. 1936); *Friedman* v. *International Ass'n. of Machinists*, 220 F.2d 808, 810 (D.C. Cir. 1955); 1 Moore, *Federal Practice* ¶ 0.96[2] (2d ed. 1968). In sum, then, the association and plaintiff teachers have justiciable claims against the board under the First and Fourteen Amendments, and this Court has jurisdiction of those claims under 28 U.S.C. §§ 1343(3) and 1331.[5]

Thus, all the defendants in this case are properly before the Court.

Respectfully,

/s/ Stephen J. Pollak
STEPHEN J. POLLAK
Counsel for
Plaintiffs-Appellants

Encl: 24 additional copies
Copies by airmail to:

Lambert M. Ochsenschalger, Esq.
Stephen J. Mrkvicka, Esq.
Reid, Ochsenschlager, Murphy & Hupp
75 So. Stolp Ave.
P.O. Box 1264
Aurora, Illinois 60577

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[5] The complaint in this case does not cite Section 1331 as one of the statutory bases for jurisdiction, and it does not state that the jurisdictional prerequisites of that section have been satisfied. We hereby request that this Court permit amendment of the complaint to add these allegations. Leave to amend complaints to state a proper basis for jurisdiction is to be freely granted. *E.g., United Steelworkers of America, AFL-CIO* v. *Mesker Bros. Industries, Inc.*, 457 F.2d 91, 93 (9th Cir. 1972); 3 *Moore, supra*, ¶ 15.09; see also *Eklund* v. *Mora*, 410 F.2d 731 (5th Cir. 1969); 3 *Moore, supra*, ¶ 15.11, at 969.

In The

Supreme Court of the United States

October Term, 1973

No. 73-1408

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT NO. 131 OF KANE COUNTY, ILLINOIS; BONNIE SCHOEPPEL, HENRY W. COWHERD, JR., FRANK N. HETTINGER, ERVIN C. KIESO, ALBERT PLATT, STUART J. SHOGER and LEO KISH, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; ANDREW J. HOOK, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois,

Petitioners,

vs.

AURORA EDUCATION ASSOCIATION EAST, DON IRELAND, JEANETTE SMITH, DAVE COLE, BERNIE ZIELIE, DIANA PARKER, LeROY OLSON and CAROLE DAVEY,

Respondents.

REPLY BRIEF FOR PETITIONERS

LAMBERT M. OCHSENSCHLAGER
REID, OCHSENSCHLAGER, MURPHY AND HUPP
75 South Stolp Avenue — P. O. Box 1368
Aurora, Illinois 60507
Telephone: (312) 892-8771

Attorney for Petitioners

ROBERT B. HUPP
WAYNE F. WEILER
REID, OCHSENSCHLAGER, MURPHY AND HUPP
Of Counsel

Midwest Law Printing Co., Chicago 60601, Financial 6-2988

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In The

Supreme Court of the United States

October Term, 1973

No. 73-1408

BOARD OF EDUCATION OF AURORA PUBLIC SCHOOL DISTRICT NO. 131 OF KANE COUNTY, ILLINOIS; BONNIE SCHOEPPEL, HENRY W. COWHERD, JR., FRANK N. HETTINGER, ERVIN C. KIESO, ALBERT PLATT, STUART J. SHOGER and LEO KISH, individually and as members of the Board of Education of Aurora Public School District No. 131 of Kane County, Illinois; ANDREW J. HOOK, individually and as superintendent of Aurora Public School District No. 131 of Kane County, Illinois,

Petitioners,

vs.

AURORA EDUCATION ASSOCIATION EAST, DON IRELAND, JEANETTE SMITH, DAVE COLE, BERNIE ZIELIE, DIANA PARKER, LeROY OLSON and CAROLE DAVEY,

Respondents.

REPLY BRIEF FOR PETITIONERS

ARGUMENT.

In our Petition for Certiorari we have cited the numerous cases in which school districts, school boards and other educational agencies, have been held to be outside the purview of 42 U.S.C. §1983. Respondents in their brief in opposition have been unable to cite any case where that specific issue was before the court and where a holding to the contrary has been specifically rendered. Furthermore, now is the proper time to present this issue for appeal on certiorari. The list of state agencies and public entities absolved from the necessity of defending civil rights actions of this kind is growing at an accelerated rate in light of this court's recent decisions in *City of Kenosha* v. *Bruno*, 412 U.S. 507 (1973), and *Moor* v. *County of Alameda*, 411 U.S. 693 (1973). In addition, this Supreme Court has very recently granted certiorari in the case of *Wood* v. *Strickland*, Docket No. 73-1285, in which the question of immunity from suit under §1983 for school boards and their individual members has been directly presented for review—the exact issue presented here.

School districts and school boards have increasingly become the targets of civil rights actions of this kind. The holding of the Court of Appeals, if allowed to stand in this case, will only serve to encourage a greater multiplicity of such suits in the future. The supervision and clarification of the issue by this court is now necessary because state educational agencies will be held amenable to suit under 28 U.S.C. §1343 and 42 U.S.C. §1983 while other state agencies remain immune from such litigation

even though they differ only in terms of the specific governmental functions they perform.

In short, the questions presented in our petition are presently ripe for review. The petitioners should not be required to enter into an unnecessary adjudication of this case in the trial court only to discover later that they were correct in their assertion that they were not proper defendants in the first instance. The extent of the coverage of §1983 affects the subject matter jurisdiction of the District Court under 28 U.S.C. §1343. If that court does not have the power to proceed as to all or certain of the defendants, the litigation against all who are not proper parties should be immediately terminated.

Again we must stress that we are not simply contesting the denial of a motion to dismiss or any other mere interlocutory order as the respondents suggest. The Court of Appeals has directly ruled on a subject matter jurisdictional question. The power of the trial court to proceed with this matter is an issue which may be raised at any time and before any court which is called upon to consider the case.

I.

ILLINOIS SCHOOL BOARDS ARE DESIGNATED BY ILLINOIS LAW AS CORPORATE STATE AGENCIES.

The respondents argue that we do not consider the question of immunity for a board of education as distinct from a school district. While there may be a literal distinction between the district as a geographical unit and a board of education as the governmental agency operating it, the law of Illinois is that a school board is a corporate *state agency*.

The respondents have named as defendants not only the members of the board in their respresentative and individual capacities, but also the Board of Education as an entity. The law of Illinois is clear that a board of education is treated like a municipal corporation and as such it is not a "person" for purposes of an action under §1983. Chapter 122, Section 10-2, Ill. Rev. Stat., clearly states:

> The directors of each district shall be a body politic and corporate, by the name of "School Directors of District No. ....., County of ....., and State of Illinois, . . .". (See Appendix A herein)

The Illinois courts have always considered school boards to be *agencies* of the state. In *Wauconda Tp. School Dist.* v. *County Board Etc.*, 7 Ill. App. 2d 65 (1955), the Court states at page 68:

> School districts are involuntary political or civil divisions of the state created as auxiliaries of the state to aid in the general administration of government. A legally constituted school district is composed of the territory included within its corporate boundaries. It is a quasi-municipal corporation and the board of education of the school district is an agency of the state and not a subdivision thereof and is a separate and distinct corporation which furnishes the method and machinery for government and management of the district.

In fact, under Ilinois law board members may not be sued individually in their representative capacities for only the board as a corporate entity may be properly named in such a suit, *Botkin et al.* v. *Osborne*, 39 Ill. 101 (1866).

A further implication of Illinois law is that board members acting in their official capacities are to be specifically given protection from suit in actions of this kind. Chapter 122, §10-20.20, Ill. Rev. Stat., the Illinois School Code specifically empowers school boards:

> To indemnify and protect school districts, members of school boards, employees, and student teachers against civil rights damage claims and suits, constitutional rights damage claims and suits . . . when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board. . . . (See Appendix A herein)

Thus, to extend coverage of §1983 to school boards and their members in this instance would be to subject the taxpayers of the school district to possible exposure to damages in this case. Such a circumstance if allowed to exist directly contravenes the reasons for the recognized legislative exception attached to the meaning of the word "person" in §1983.

Respondents attempt to distinguish the many cases which we have cited to the Court. But the plain fact is that state governmental agencies such as school boards in Illinois are not within the coverage of §1983. Board members have no individual governmental authority in Illinois. In their representative capacities they take on the collective quasi-municipal corporate identity cast upon them by Illinois statute. That is the thrust of the many cases cited to this Court and no matter whether a school district, school board or other educational agency is involved, state-created and controlled agencies are specifically exempted under §1983.

II.

IF THE SCHOOL BOARD AND ITS MEMBERS ARE NOT PROPER "PERSONS" UNDER §1983, THE DISTRICT COURT LACKS SUBJECT MATTER JURISDICTION.

The respondents erroneously contend that if the coverage of §1983 is not extended to the defendants in this case, then they may still maintain their action under 28 U.S.C. §1331 or 1343(3). But this is simply not the case.

§1331 is not alleged as a ground for jurisdiction in the complaint and is not in issue before this or any other court.

The assertion that the constitutional amendments alone are grounds for jurisdiction is clearly not the law. Plaintiffs in the case of *Harkless* v. *Sweeny Independent Sch. Dist. of Sweeny, Texas,* 300 F. Supp. 794 (1969) unsuccessfully made a similar argument. The court held at p. 807:

> Section 1343 grants to the district courts jurisdiction only over civil actions "authorized by law to be commenced by any person." It cannot be argued that the Fourteenth Amendment itself authorizes the commencement of civil actions. To so construe it would be to ignore the express terms of the Amendment and render the enactment of 42 U.S.C. §1983 superfluous. . . . Therefore, as 28 U.S.C. §1343(3) is not sufficient in the absence of another statute to authorize the prosecution of civil actions against persons alleged to have violated another's constitutional rights, plaintiff's claim must be dismissed.

The respondents cite *Bivens* v. *Six Unknown Named Agents,* 403 U.S. 388 (1971) and *Bell* v. *Hood,* 327 U.S. 678 (1946), for their proposition that the "constitution may give rise directly to causes of action. . . ." (Opp. p.

11, note 4). But those opinions clearly do not state what respondents assert about them. In *Bell* v. *Hood*, this court reserved the question of whether the Fourth Amendment gives rise to a cause of action for damages. In *Bivens* it is clear that the only issue before the court was whether the Fourth Amendment gives rise to a cause of action for damages for purposes of the jurisdictional amount under §1331. §1343(3) jurisdiction was not involved in either of these cases.

The respondents have invoked the subject matter jurisdiction of the District Court by way of §1343(3). Since §1983 does not authorize a cause of action against the defendants here, and since no other federally allowed statutory cause of action is alleged, there is no ground for §1343 jurisdiction. It is a well-known proposition of law that lack of jurisdiction over the subject matter is never waived, and if such lack of jurisdiction appears at any time in the case, the court must dismiss the action. Rule 12(h)(3) F. R. Civ. Proc.; *United States* v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381 (8 Cir. 1960).

What causes of action respondents could have alleged or may in the future allege is of no consequence in this case. The subject matter of the District Court over the cause of action alleged in this case is in issue and that is an issue which is ripe for review at any stage of the proceedings.

III.

NO COURT HAS SPECIFICALLY HELD THAT SCHOOL BOARDS ARE "PERSONS" UNDER §1983 WHERE THE QUESTION HAS BEEN SPECIFICALLY RAISED.

The respondents next contend that the holding of the court below is not in conflict with the *Moor*, *Monroe* and

City of Kenosha decisions rendered by this court. They state that these decisions did not involve boards of education, and thereafter set out numerous decisions in which relief was granted under §1983 against school boards and school districts without any mention of immunity. However, in none of the cases cited by the respondents was the question of immunity ever raised by the parties or by the courts.

In *Monroe* v. *Pape,* 365 U.S. 167, 191 n. 50, this court specifically declined to consider the extent of the coverage of §1983 based upon cases which did not specifically raise the question of immunity under the statute. The same point was recently made in *City of Kenosha* v. *Bruno,* 37 L. Ed. 2d 109 at 116.

Since none of the cases cited by the respondents spefically raised the issue of immunity under §1983 they are of no consequence in determining the coverage of that statute if the past custom of this court is to be continued.

The very recent opinions in *Scheuer* v. *Rhodes,* 42 U.S.L.W. 4543 (April 17, 1974) and *Edelman* v. *Jordan,* 42 U.S.L.W. 4419 (March 25, 1974) are cited as authority to the effect that a board of individuals is subject to suit under §1983. The plain fact is that the court as in both instances speaking solely of immunity under the Eleventh Amendment—a question which is not entirely determinative of this case.

IV.

THE PARTIES WERE NOT PROPERLY ALLOWED TO BRIEF AND ARGUE THE COVERAGE OF §1983 ON THE MERITS.

The Respondents state that the question presented here was argued before the Court of Appeals. While the issue

was mentioned in the briefs on both sides, neither plaintiffs nor defendants fully argued or briefed the merits of the immunity question because the Court of Appeals was not called upon to rule on anything other than the substantive constitutional issues originally presented by the respondents.

Respondents ignore their own written comments about the question of immunity which were presented to the Court of Appeals through a letter to Clerk Kenneth J. Carrick dated October 4, 1973 (Opp. App. 4a):

> *City of Kenosha* raises a question whether the Aurora school board is suable under Section 1983. While we take the position that it is, this question need not be resolved here. . . . The court can, therefore, proceed to decide the constitutional issues presented in the case and leave the question of the suability of the school board for resolution on remand with full briefing and development of the facts.

Even the Court of Appeals states at (Pet. App. 8a):

> There are other points such as whether plaintiffs could recover the types of damages they claim, which do not go to the *only issue before this court; that is whether the complaint states a valid cause of action.* (Emphasis supplied)

It is clear that the parties, themselves, intended only to contest the single ground for dismissal relied upon by the trial court and that the Court of Appeals erroneously and gratuitously took it upon itself to decide some of the other grounds for dismissal without first properly calling upon the arguments of counsel or considering the current state of the law as set forth by this court.

CONCLUSION.

For the reasons and authorities presented above and in our original Petition, Petitioners pray that this court issue a Writ of Certiorari or that this Petition be consolidated by this court along with *Wood* v. *Strickland,* No. 73-1285 upon which certiorari has already been granted on substantially the same issues.

Respectfully submitted,

LAMBERT M. OCHSENSCHLAGER
REID, OCHSENSCHLAGER, MURPHY AND HUPP
75 South Stolp Avenue — P. O. Box 1368
Aurora, Illinois 60507
Telephone: (312) 892-8771

Attorney for Petitioners

ROBERT B. HUPP
WAYNE F. WEILER
REID, OCHSENSCHLAGER, MURPHY AND HUPP
Of Counsel

APPENDIX A

ILLINOIS REVISED STATUTES, CHAPTER 122

10-2. § 10-2. Corporate powers. The directors of each district shall be a body politic and corporate, by the name of "school directors of district No. ....., county of .....and State of Illinois," and by that name may sue and be sued in all courts and places where judicial proceedings are had.

10-20.20. § 10-20.20. Protection from suit. To indemnify and protect school districts, members of school boards, employees, and student teachers against civil rights damage claims and suits, constitutional rights, damage claims and suits and death and bodily injury and property damage claims and suits, including defense thereof, when damages are sought for negligent or wrongful acts alleged to have been committed in the scope of employment or under the direction of the board. Such indemnification and protection shall extend to persons who were members of school boards, employees of school boards or student teachers at the time of the incident from which a claim arises if that incident occurred on or after September 5, 1967. No agent may be afforded indemnification or protection unless he was a member of a school board, an employee of a board or a student teacher at the time of the incident from which the claim arises. Amended by P.A. 77-719, § 1, eff. Aug. 12, 1971.